No. 85-406

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

GEORGE R. ARIYOSHI, GOVERNOR, STATE OF HAWAII, et al.,

Petitioners,

v.

SELWYN A. ROBINSON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT OLOKELE SUGAR COMPANY, LIMITED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the lower courts err in effectuating a 1931 federal adjudication that respondents could divert "normal surplus" water from the Hanapepe River?*

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*Respondent Olokele Sugar Company, Limited is a partially owned subsidiary of C. Brewer & Company, Limited, which is a subsidiary of C. Brewer Hawaii, Ltd., which in turn is a subsidiary of IU International Corporation. Intermetal Mexicana S. A. is a partially owned subsidiary of IU International Corporation.

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BRIEF OF RESPONDENT
OLOKELE SUGAR COMPANY, LIMITED
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WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI provides in relevant part that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 1331 (1982) provides in relevant part that

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a) (1982) provides in relevant part that

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . .

28 U.S.C. § 1738 (1982) provides in relevant part that

> The records and judicial proceedings of any court of any such State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . .

STATEMENT OF THE CASE

In 1931, the Ninth Circuit Court of Appeals, affirming the Supreme Court of the Territory of Hawaii, adjudicated the rights of Gay & Robinson ("G&R") and its lessee to divert the "normal surplus" waters of the Hanapepe River. *Territory v. Gay*, 52 F.2d 356 (9th Cir.) ("*Territory II*"), *cert. denied*, 284 U.S. 677 (1931). The "action . . . brought by the territory of Hawaii to enjoin the further diversion . . . of the Hanapepe River" failed. 52 F.2d 356. At the time, the diversions had been ongoing for 40 years, or since 1891. 52 F.2d 356.

After the Ninth Circuit acted in *Territory II*, Olokele Sugar Company, Limited ("Olokele") acquired the interest of G&R's lessee. *Robinson v. Ariyoshi*, 441 F. Supp. 559, 575 (D. Haw. 1977), A 85, *aff'd*, 753 F.2d 1468 (9th Cir. 1985) (hereinafter cited as "441 F. Supp. at " and "753 F.2d at ").

In this case, the District Court and the Ninth Circuit were

called upon to effectuate *Territory II* in the face of rulings by the Hawaii Supreme Court in *McBryde Sugar Co. v. Robinson*, 54 Hawaii 174, 504 P.2d 1330 (''*McBryde I*''), *aff'd on rehearing*, 55 Hawaii 260, 517 P.2d 26 (1973) (''*McBryde II*''), *appeal dismissed and cert. denied*, 417 U.S. 962, 976 (1974) (''*McBryde III*''), which failed to afford full faith and credit to the federal decision.

Factual findings of both the District Court and the Ninth Circuit determined that the Hawaii Supreme Court in *McBryde I* and *II* refused to consider the federal constitutional issues which were later presented in this case. 753 F.2d at 1470 and 1472, A 4-5 and 8-9; 441 F. Supp. at 580, A 96. Since *McBryde I* and *II* did not reach the constitutional issues presented to the federal courts below, the lower courts saw no preclusion.

The two lower courts, with the entire record in *McBryde I* and *II* before them, made further determinations that the State Court failed to provide a hearing on the issues later presented in federal court. 753 F.2d at 1470-3, A 4-9; 441 F. Supp. at 564, 572 and 580, A 62, 79 and 96. The District Court, mincing no words, stated explicitly that the lack of a hearing alone rendered *McBryde I* void. 441 F. Supp. at 580, A 96.

Petitioners admitted in the District Court that no hearing had been held either at trial or on appeal prior to the limited rehearing regarding either G&R's rights to ''normal surplus'' water or the right to transport water out of the watershed of origin. Findings 3 and 4, 441 F. Supp. at 570-1, A 75-6; Answer to Request for Admissions, paragraphs 7-10, R. 33 and 39, reprinted in the Appendix hereto.

The District Court found further that at ''no time prior to the entry of the judgment by the Supreme Court in *McBryde I* did any party dispute or deny the right of any party to transport any water'' beyond the watershed. 441 F. Supp. at 570-1, A 76. The issues raised and tried in *McBryde I* did not concern the rights to ''normal surplus'', which had already been determined by the Ninth Circuit in *Territory II*, but rather concerned ''appurtenant,'' ''prescriptive,'' and ''storm and freshet'' water. 441 F. Supp. 563 and 571, A 59 and 76.

Petitioners conceded in the Ninth Circuit that "[t]he question of normal surplus water was not an issue for reason that the parties assumed that G&R was entitled to the same . . . ." Opening Brief of State Officials, Defendants-Appellants, dated August 29, 1978, at 5.

In the District Court, petitioners admitted that the right to take "normal surplus" water or water generally out of a watershed had not been at issue either before the trial court or on appeal before *McBryde I*. Findings 3 and 4, 441 F. Supp. at 570-1, A 75-6; Answer to Request for Admissions, paragraphs 8-9, R. 33 and 39, reprinted in the Appendix hereto.

The Hawaii Supreme Court's own statement that the constitutional issues were "born" in *McBryde I* implicitly concedes that the constitutional questions had not been heard and considered in the action. *Robinson v. Ariyoshi*, 65 Hawaii 641, 661, 658 P.2d 287, 302 (1982) A 36.

After issues concerning "normal surplus" and the transportability of water were injected by the State Supreme Court *sua sponte* in *McBryde I*, 441 F. Supp. at 563, A 61, Olokele, which had been satisfied with the trial court's opinion in the *McBryde* litigation and had not been active on the appeal, immediately filed a "Motion for Partial Vacation of Opinion and for Opportunity to Present Evidence and Argument." 441 F. Supp. at 571, A 78. Olokele's motion was "promptly denied." *Id.* Subsequently, Olokele was permitted to brief and to argue two "narrow issues" of State law which the Supreme Court agreed to hear in a limited rehearing. 441 F. Supp. at 572, A 79.

Although it has been intimated that argument on the taking issue was permitted on the limited rehearing, *Robinson v. Ariyoshi*, 65 Hawaii 641, 660, 658 P.2d 287, 301 (1982) A 34, the findings of the District Court, concurred in by the Ninth Circuit, are to the contrary. 441 F. Supp. at 564, 572, and 580, A 62, 79 and 96; 753 F.2d at 1470-3, A 4-9.

Following the "almost farcical 'rehearing'," 441 F. Supp. at 580, A 96, an effort to obtain review in this Court of matters not discussed in the majority opinion of the Hawaii Supreme

Court failed. *McBryde III*.

Although Petitioners had not actually endeavored to halt the use by Respondents of their water rights, the Ninth Circuit found that the litigation history together with the language of *McBryde I* sufficiently interfered with Respondents' ability to finance improvements or to sell their lands that at least declaratory relief was appropriate. 753 F.2d at 1471, A 6.

REASONS FOR DENYING THE WRIT

The impact of this case is limited to Hawaii, a point highlighted by Petitioners' argument that the case has effects from Hawaii's "wettest forests" to its "driest kuleanas." Petition at 19.

The case presents a situation which seldom occurs where a federal court, having once adjudicated a claim, must act again to effectuate its prior decree against determinations made by another court. Although the situation is rare, the principles of jurisprudence applied by the District Court and the Ninth Circuit have long been settled. No new doctrines were enunciated.

I. THE FEDERAL DETERMINATIONS IN TERRITORY II WERE EFFECTUATED PROPERLY BY THE LOWER COURTS.

Olokele's water rights were adjudicated in federal court in *Territory II*.

Because the federal courts had the power to act in that case, they have ancillary jurisdiction to effectuate their determinations. *Steelman v. All Continent Corp.*, 301 U.S. 278, 289 (1937); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled."); *see generally*, 13 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3523 (1984).

As stated in 18 Wright, Miller & Cooper, *Federal Practice*

and Procedure: Jurisdiction § 4468 at 648 (1981), "[i]t would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts . . . ."

The existence of *Territory II* was one of several bases for the assertion of federal jurisdiction by the lower courts and was also one of several reasons why the determinations in *McBryde I* were not entitled to preclusive effect. *See Mitchum v. Foster*, 407 U.S. 225, 235-6 (1972).

II. EVEN IF OLOKELE'S WATER RIGHTS WERE NOT PROTECTED BY TERRITORY II, THE LOWER COURTS COULD ACT.

A. The District Court Had Jurisdiction.

Federal jurisdiction existed not only to effectuate the federal determinations in *Territory II* but also under 28 U.S.C. § 1331(a) (1982). The complaint and cross-claims depended directly upon constitutional provisions. There were both procedural and substantive due process issues. *Cf. Herring v. New York*, 422 U.S. 853 (1975); *Hughes v. State of Washington*, 389 U.S. 290, 296-7 (1967) (Stewart, J., concurring); *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1359 (9th Cir. 1977), *aff'd in part, rev'd in part sub nom., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

The District Court also had jurisdiction under 28 U.S.C. § 1343(3) (1982) of an action to redress the deprivation, under color of law, of property rights protected by the Constitution. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399-400 (1979); *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978); *Mitchum v. Foster*, 407 U.S. 225 (1972); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

The basis for the District Court's jurisdiction was not that it sat as an appellate court vis-a-vis the Hawaii Supreme Court. The District Court adjudicated claims which were within its

own original jurisdiction and, except for *Territory II*, had not been adjudicated, certainly not in any proceeding entitled to *res judicata* effect.

B. McBryde Was Not Res Judicata.

As for *res judicata* or "claim preclusion," whatever was said in *McBryde I*, the Supremacy Clause of the U.S. Const. art. VI required the federal courts to effectuate the federal determinations made in *Territory II*. 441 F. Supp. at 583-4, A 102-4; 18 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 4468, at 649 (1981); A. Vestal, *Protecting a Federal Court Judgment*, 42 Tenn. L. Rev. 635, 643-4 (1975). *McBryde* "cannot survive the command of the Supremacy Clause of the United States Constitution." *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 695 (1979).

28 U.S.C. § 1738 (1982) does not mean that the claims presented in the District Court were precluded by *McBryde I*. Again, the Supremacy Clause required that full faith and credit be given to the federal decision in *Territory II*. In enacting 28 U.S.C. § 1738, Congress has not required that a valid federal decision be disregarded in favor of a contrary state decree. *Marrese v. American Academy of Orthopaedic Surgeons*, 105 S.Ct. 1327 (1985) specifically recognizes that the general command of Section 1738 is subject to exceptions. Indeed, according to some courts, Section 1738 itself requires state courts to give effect to a prior federal judgment. *Hancock National Bank v. Farnum*, 176 U.S. 640 (1900); see A. Vestal, *Protecting a Federal Court Judgment*, 42 Tenn. L. Rev. 635, 639-43 (1975); 18 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 4468 (1981).

However, even if *Territory II* had never been litigated and "the matter were open for a fresh decision," 753 F.2d at 1470, A 3, *McBryde I* and *II* would still not preclude the claims presented to the District Court. As determined by factual findings of the District Court, concurred in by the Court of Appeals,

the *McBryde* court chose not to consider the federal claims and allowed no hearing compatible with the Due Process Clause with respect to the federal claims.

The courts below did not "presume" that *McBryde II* did not "pass upon" the constitutional claims simply because the Hawaii Supreme Court "did not explicitly state" that the claims lacked merit. Petition at 20. There was no "presumption of 'non-decision'." *Id.* at 21. It was proven and found in the District Court, and affirmed by the Court of Appeals, that the *McBryde* court never decided and refused to hear the constitutional claims presented in the District Court. 441 F. Supp. at 564, 572, 580, A 62, 79, 96; 753 F.2d at 1470-3, A 4-9.

The present Petition in the end rests upon a challenge to the factual determinations of two lower courts.

Apart from the lack of a hearing, the *McBryde* court could not properly adjudicate Respondents' rights to "normal surplus" water and to transport water beyond the watershed of origin because those matters were not before the court. Petitioners refer to some of the evidence considered by the District Court but overlook the District Court's finding that until the determination in *McBryde I*, the case concerned the "appurtenant" and "prescriptive" water rights of the parties and their rights to "storm and freshet" water, with no challenge to the right to transport "normal surplus" water out of the watershed. 441 F. Supp. at 563 and 571, A 59 and 76; 753 F.2d 1470, A 4. Claim preclusion does not apply to a decision which goes beyond the claims presented. *Haring v. Prosise*, 462 U.S. 306, 315-6 (1983); *Schlesinger v. Councilman*, 420 U.S. 739, 741 (1975); *Hansberry v. Lee*, 311 U.S. 31, 40 (1940); *Bigelow v. Forrest*, 9 Wall. 339, 19 L.Ed. 696, 700 (1869).

The "*Feldman* doctrine," which is premised upon the existence of a valid decision, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), has no applicability in the present context. *Feldman* simply applied the usual rule against collateral attacks on valid judgments. This Court has recognized, however, that "special circumstances warrant an exception to the normal rules of preclusion". *Montana v.*

United States, 440 U.S. 147, 155 (1979). One such exception is where there has not been "a full and fair opportunity to litigate." *Id.* at 153. As the Court said in *Allen v. McCurry*, 449 U.S. 90, 95 (1980), "one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." Indeed, "due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process." *Griffin v. Griffin*, 327 U.S. 220, 228-9 (1946).

In the context of 28 U.S.C. § 1738 (1982), the question is not what Hawaii Supreme Court Justice Richardson, who chose both to appear as an amicus in the proceedings in the Court of Appeals and to author the Hawaii Supreme Court's certified answers to the Ninth Circuit, may say with respect to the preclusive effect of *McBryde*, but what the "law or usage" in the Courts of Hawaii is. As elsewhere, *res judicata* depends upon the existence of a valid judgment rendered after a fair opportunity for a hearing. *Marsland v. International Society for Krishna Consciousness*, 66 Hawaii 119, 124-5, 657 P.2d 1035, 1038-9, *appeal dismissed*, 104 S.Ct. 52 (1983); *Morneau v. Stark Enterprises, Ltd.*, 56 Hawaii 420, 421-2, 539 P.2d 472, 474 (1975); *Solarana v. Industrial Electronics, Inc.*, 50 Hawaii 22, 26-7, 428 P.2d 411, 415 (1967).

In any event, the preclusive effect to be given to *Territory II* should be deemed a question of federal, not state, law, at least as to the minimal effect required to be given to the federal judgment. *Compare Marrese v. American Academy of Orthopaedic Surgeons*, 105 S.Ct. 1327, 1335 (1985) *with Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). *See generally, Restatement (Second) of Judgments* § 87 (1982); A. Vestal, *Protecting a Federal Court Judgment*, 42 Tenn. L. Rev. 635, 640 (1975).

Although Petitioners assert that the constitutional issues presented on rehearing "involved pure questions of law," Petition at 26, among the factual issues presented were:

(1) whether the government of Hawaii had so recognized private ownership of "normal surplus" water and the transportability of water that assertion of the contrary would be estopped; (2) whether, under Section 1-1 of the Hawaii Revised Statutes (1976), ancient Hawaiian usage allowed for private ownership and transportability of water; and (3) whether Respondents relied upon the existence of their water rights so as to make the rights vested. Factual evidence on those matters was refused in the state court, but when an opportunity for a hearing was presented in federal court, the proof was clear.

Because the Hawaii Supreme Court refused to hear or to consider Petitioners' federal claims, *McBryde I* did not preclude a federal determination of the claims presented in the District Court.

C. **The Case Was Ripe.**

The federal courts were not required to refrain from granting declaratory relief until Petitioners "applied" *McBryde*. Respondents had a right to ask the federal courts for certainty regarding the continued efficacy of *Territory II* to enable Respondents to proceed with the use, improvement, or potential transfer of their lands and waters. 753 F.2d at 1471, A 6. The federal courts were not required to turn a deaf ear to Respondents' immediate need to know whether the cane they were continually planting and cultivating could be irrigated. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 200-202 (1983). The "compelling need for certainty in the holding and use of water rights" has already been recognized by this Court. *Arizona v. California*, 406 U.S. 605, 620 (1983).

A concrete factual situation involving specific property rights was presented, not a hypothetical challenge to the mere enactment of legislation. *Cf. Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981). The present case does not involve uncertainty as to how regulations on "development" will be applied. *Cf. Williamson County*

Regional Planning Commission v. Hamilton Bank, 105 S.Ct. 3108 (1985). *McBryde I* held point blank that "the State is the owner of the water" and "neither McBryde nor Gay & Robinson may transport water to another watershed." 54 Hawaii at 200, 504 P.2d at 1345, A 187.

In the proceedings below, Petitioners never contended that the federal court had to await application of some "state regulatory processes," see Petition at 23, before the ownership of "normal surplus" waters in the Hanapepe River and the transportability of water could be adjudicated. Petitioners raised no ripeness arguments at all. See Opening Brief of State Officials, Defendants-Appellants, dated August 29, 1978. Although Amicus Richardson did contend that the rulings of *McBryde I* regarding "normal flow" surplus might be "dicta," the precise argument made in part II of the Petition, that the taking issue could not be decided until the *McBryde* rulings were applied, is being presented for the first time in this Court on the basis of cases not cited in the proceedings below.

CONCLUSION

The authority of the courts below to effectuate *Territory II* was complete. Having affirmed in *Territory II* Respondents' rights to divert "normal flow" surplus, the Ninth Circuit was not required to subvert its own ruling in favor of a decision of the Hawaii Supreme Court rendered without a full hearing in an action which did not even involve "normal surplus" water or the transportability of water.

Respondents' need for certainty concerning their water rights in the face of a judicial ruling never disavowed by Petitioners that the water was owned by the State presented a controversy that was far from hypothetical and cried out for declaratory relief.

Respectfully submitted,

/s/ WILLIAM F. QUINN

WILLIAM F. QUINN
Counsel of Record for
Olokele Sugar Company,
Limited

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-406

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APPENDIX TO BRIEF OF RESPONDENT
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APPENDIX A
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

SELWYN A. ROBINSON, et al.,	)	
	)	
Plaintiffs,	)	CIVIL NO. 74-32
	)	
vs.	)	
	)	
GEORGE R. ARIYOSHI, et al.,	)	
	)	
Defendants.	)	
	)	

REQUEST FOR ADMISSIONS
[Filed December 23, 1974]

. . . .

Plaintiffs request that each defendant admit that:

. . . .

6. Throughout the proceedings in *McBryde v. Robinson*, Gay & Robinson claimed the right to divert the normal surplus water of Hanapepe River to Makaweli.

7. In its briefs filed in the Fifth Circuit Court, the State of Hawaii stated that Gay & Robinson as owner of the *ili* of Koula is entitled to the normal daily surplus in Hanapepe River.

8. At no time from the beginning of trial to the entry of final judgment by the Fifth Circuit Court in *McBryde v. Robinson* did any party deny or dispute Gay & Robinson's right to take the normal surplus water out of Hanapepe River.

9. At no time from the beginning of trial to the entry of final judgment by the Fifth Circuit Court in *McBryde v. Robinson* did any party deny or dispute Gay & Robinson's right to take and transport the normal surplus water to Makaweli.

10. At no time from the beginning of trial to the entry of final judgment by the Fifth Circuit Court in *McBryde v. Robinson* did any party dispute or deny the right of any other party to transport any water which he might own by "appurténant" "prescriptive" or "normal surplus" right for use on lands other than those from which those rights originated, and to sell or lease such rights separate from the lands from which such rights originated.

. . . .

DATED: Honolulu, Hawaii, December 11, 1974.

/s/ J. Garner Anthony

J. GARNER ANTHONY
Attorney for Plaintiffs

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

SELWYN A. ROBINSON, et al.,	)	
	)	
Plaintiffs,	)	CIVIL NO. 74-32
	)	
vs.	)	
	)	
GEORGE R. ARIYOSHI, et al.,	)	
	)	
Defendants.	)	
	)	

ANSWER TO REQUEST FOR ADMISSIONS

[Filed January 27, 1975]

The State of Hawaii and officers of the State of Hawaii, Defendants in Civil No. 74-32, subject to all pertinent objections to admissibility which may be interposed at the trial or in further proceedings herein, answer the Request for Admissions by Plaintiffs as follows:

. . . .

Request No. 6. Defendants deny that Gay & Robinson claimed the right to divert the normal surplus water of Hanapepe River to Makaweli throughout the proceedings in the trial court. That question was not in issue. Such claim was only asserted in the Hawaii Supreme Court.

Request No. 7. Defendants admit that on page 18 of the State's Opening Brief filed in the Fifth Circuit Court, it is stated that "As held by our Supreme Court, Gay and Robinson as owner of the Ili of Koula is entitled to the normal daily surplus water in Hanapepe River." Defendants point out, however, that the State's Opening Brief also noted the division of opinion on this question by the Hawaii Supreme Court on page 4, as follows:

"7. 1930—The Supreme Court (in Equity No. 2911), reported in *Territory v. Gay*, 31 Haw. 376 (1930), rendered three separate opinions by the presiding judges:

(a) Chief Justice Perry agreed with the trial court's holding, and further, he indicated that the owners of Koula should also be entitled to all of the surplus storm and freshet waters.

(b) Justice Parson concurred in part with the Chief Justice's opinion as to the ownership of the normal, daily surplus waters by the owners of Koula, but dissented as to the ownership of the storm and freshet surplus waters since that question was not before the trial court.

(c) Justice Banks, in his dissenting opinion, favored the application of the riparian doctrine concerning the ownership of all surplus waters of the stream as held in *Carter v. Territory*, 24 Haw. 47."

Thus, the question of ownership of surplus water was in a state of flux.

Request No. 8. Defendants admit Request No. 8 for reason that no one in the trial court claimed the right to take the normal surplus water out Hanapepe River since that question was not in issue. Furthermore, the State of Hawaii, as well as Gay & Robinson and Olokele Sugar Company, were aware that much of the water diverted by Gay & Robinson was used to water government land leased for sugarcane cultivation situate on the westerly slope of Hanapepe Valley and comprising some 1,900 acres, under lease at present to Olokele Sugar Company under General Lease No. 3814.

Request No. 9. Same answer as given in Request No. 8.

Request No. 10. Same answer as given in Request No. 8.

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DATED: Honolulu, Hawaii, January 27, 1975.

/s/ John Campbell, Jr.

JOHN CAMPBELL, JR.
Deputy Attorney General
Attorney for State of Hawaii